

HONORABLE BARBARA J. ROTHSTEIN

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

SIERRA CLUB, *et al.*,

Plaintiffs,

and

THE SPOKANE TRIBE OF INDIANS,

Plaintiff-Intervenor,

v.

REGIONAL ADMINISTRATOR OF THE  
ENVIRONMENTAL PROTECTION  
AGENCY, CHRIS HLADICK, *et al.*,

Defendants,

and

SPOKANE COUNTY; KAISER  
ALUMINUM WASHINGTON LLC; and  
STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY,

Defendant-Intervenors.

No. C11-1759BJR

JOINT MOTION TO GOVERN AND  
STIPULATED [PROPOSED] ORDER  
SETTING BRIEFING SCHEDULE FOR  
EPA'S AND INTERVENOR-  
DEFENDANTS' MOTIONS TO DISMISS

Note on Motions Calendar: June 17, 2020

JOINT MOTION AND STIPULATED  
[PROPOSED] ORDER SETTING  
SCHEDULE FOR MOTIONS TO DISMISS - 1

Case No. C11-1759BJR

David J. Kaplan.  
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P.O. Box 7611  
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1 The Parties in this action -- Plaintiffs Sierra Club and Center for Environmental Law &  
 2 Policy (collectively "Sierra Club"), Defendants the Regional Administrator of the Environmental  
 3 Protection Agency, Chris Hladick and the United States Environmental Protection Agency  
 4 (collectively "EPA"), Plaintiff-Intervenor Spokane Tribe of Indians (the "Tribe"), Defendant-  
 5 Intervenor Spokane County, Defendant-Intervenor Kaiser Aluminum Washington LLC, and  
 6 Defendant-Intervenor State of Washington, Department of Ecology -- jointly submit this motion  
 7 to govern and proposed stipulated briefing schedule for EPA's and the Defendant-Intervenors'  
 8 motions to dismiss the supplemental complaints in this case.  
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10 The grounds for this joint motion and proposed stipulated briefing schedule are as  
 11 follows:  
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13 1) In this case, Plaintiff Sierra Club and Plaintiff-Intervenor the Tribe alleged in their  
 14 original amended complaints under the Clean Water Act and Administrative Procedure Act  
 15 ("APA") that EPA had a nondiscretionary duty under the Clean Water Act, based on the  
 16 constructive submission theory, to issue a total maximum daily load ("TMDL") for  
 17 polychlorinated biphenyls ("PCBs") for the Spokane River. After summary judgment briefing,  
 18 the Court issued its opinion on March 16, 2015, holding that a constructive submission did not  
 19 occur and thus rejecting those claims, but also holding that EPA acted contrary to law and  
 20 abused its discretion in finding the Spokane River Regional Toxics Task Force ("Task Force") a  
 21 suitable alternative to the TMDL without a schedule, and remanding to EPA to adopt a schedule  
 22 for measuring and the completion of the work of the Task Force on PCBs. Dkt. 120. EPA  
 23 completed its response to the Court's remand on July 14, 2015. *See* Dkt. 129. On April 5, 2016,  
 24 the Ninth Circuit dismissed appeals of the Court's opinion in this case (Dkt. 120). Dkt. 158.  
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1           2)       The Court on June 1, 2016, granted Plaintiffs' motion for leave to file a  
 2 supplemental complaint, Dkt. 160, which Sierra Club filed on June 2, 2016, Dkt. 162 (Sierra  
 3 Club's Second Amended Complaint), and Plaintiff-intervenor the Tribe filed on June 24, 2016.  
 4 Dkt. 168 (Tribe's Third Amended Complaint). Those supplemental complaints challenge under  
 5 the Administrative Procedure Act EPA's response to the Court's remand. On June 23, 2016, the  
 6 Parties stipulated to, and on June 24, 2016, the Court entered, a schedule to brief EPA's and  
 7 Defendant-Intervenors' anticipated motions to dismiss the supplemental complaints. Dkts 166 &  
 8 167.

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 10           3)       Before briefing commenced on the anticipated motions to dismiss, Sierra Club  
 11 and the Tribe, with the concurrences of the other parties, moved to hold this case in abeyance,  
 12 because Plaintiffs stated that they were considering whether to voluntarily dismiss their  
 13 supplemental complaints based upon the future outcome of certain ongoing State proceedings in  
 14 other matters. Dkts. 180 & 183. To preserve the status quo that existed at the time based on the  
 15 Parties' stipulation and the Court's prior orders regarding the anticipated motions to dismiss the  
 16 supplemental complaints, Dkts. 166 & 167, that motion for a stay stipulated that if Sierra Club  
 17 and the Tribe do not voluntarily dismiss this action, a motion to govern would be filed by all  
 18 parties that would set out a schedule for EPA and the Defendant-Intervenors to file, brief and  
 19 resolve their anticipated motions to dismiss this action before any additional substantive or  
 20 procedural litigation in this case. Dkts. 180 & 183.

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 22           4)       The Court granted and extended the abeyance of this case on September 12, 2016  
 23 and January 26, 2017, Dkts. 182 & 184, and directed the Parties to file status reports every 120  
 24 days. Dkt. 184. Based on the aforementioned stipulations, the Court's orders provide that if  
 25 Sierra Club and the Tribe do not voluntarily dismiss these cases, the Parties should file a motion  
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1 to govern that “set[s] out a schedule for EPA and Defendant-Intervenors to file and brief their  
2 anticipated motion to dismiss.” Dkts. 182 & 184.

3 5) Plaintiff Sierra Club and Plaintiff-Intervenor the Tribe have decided not to  
4 voluntarily dismiss their supplemental complaints. Accordingly, the Parties propose the  
5 following stipulated briefing schedule to brief and resolve EPA’s and the Defendant-Intervenors’  
6 anticipated motions to dismiss this case for lack of jurisdiction, before any other substantive or  
7 procedural motions are filed. To reduce potential redundancy and the number of separate  
8 motions to dismiss that may be necessary, the schedule proposes that the Defendant-Intervenors  
9 file their motions to dismiss supporting EPA’s motion one week after EPA files its motion, that  
10 Plaintiff-Intervenor file its opposition one week after Sierra Club files its opposition, and limit  
11 the length of each of those filings by the Intervenors to 12 pages.  
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14 1.A. EPA’s Motion to Dismiss (limited to 24 pages) July 17, 2020

15 1.B. Motions to Dismiss, by Spokane County,  
16 Kaiser Aluminum, and the State of Washington  
17 (each limited to 12 pages) July 24, 2020

18 2.A. Consolidated Opposition to the Motions  
19 to Dismiss, to be filed by  
20 Sierra Club (limited to 36 pages) August 7, 2020

21 2.B. Consolidated Opposition to the Motions to Dismiss,  
22 to be filed by the Tribe (limited to 12 pages) August 14, 2020

23 3.A. EPA’s Reply on its Motion to Dismiss (limited to 20 pages) August 28, 2020

24 3.B. Replies, by Spokane County,  
25 Kaiser Aluminum, and the State of Washington  
26 (each limited to 6 pages) September 4, 2020

## ORDER

United States District Judge

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[PROPOSED] ORDER SETTING  
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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing filing was electronically filed with the Clerk of the Court on June 17, 2020, using the CM/ECF system, which will send notification of said filing to the attorneys in this case registered with the Court's CM/ECF system.

/S/ David Kaplan

JOINT MOTION AND STIPULATED  
[PROPOSED] ORDER SETTING  
SCHEDULE FOR MOTIONS TO DISMISS - 8

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